

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

14-P-1809

COMMONWEALTH

vs.

SCOTT SMITH.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial in the Superior Court, the defendant, Scott Smith, was convicted of possession of a class B substance. The jury deadlocked on a second indictment alleging armed assault with intent to rob, and the defendant later pleaded guilty to a reduced charge of assault with intent to rob.¹ On appeal, the defendant claims that reversal is required because the jury were not instructed on the elements of possession. We agree.

At trial, the defendant, with the advice of his counsel, stipulated that the substance found on his person at the time of his arrest was cocaine. The judge read to the jury the stipulation as follows: "[I]t has been agreed between the parties that the small plastic bag found on [the defendant's]

¹ The defendant does not appeal this conviction.

person, containing multiple white rocks, was tested by a chemist and found to contain zero point one five grams of cocaine A stipulation or an agreement between the parties as to a fact means that fact you can take as proven." During his closing argument, defense counsel also stated: "And I ask you to find [the defendant] guilty of [possession] because he is guilty of that. But he's guilty of that and that alone." At the close of the evidence, the judge reminded the jury that the defendant had been charged with two offenses. However, the judge, without objection, only instructed the jury on the elements of armed assault with intent to rob.² The jury also received written instructions, which likewise omitted the elements of possession. Notwithstanding, the jury received verdict slips for both offenses.

"There is no question that in a criminal case, the Commonwealth carries the burden to prove beyond a reasonable doubt each element of any crime charged, and in a jury trial, it is the jury that must determine whether the Commonwealth has met this burden." Commonwealth v. Ortiz, 466 Mass. 475, 480-481 (2013). It necessarily follows that failure to instruct the jury on an element of a crime charged "is an error of constitutional dimension that violates the due process clause of

² A fair reading of the record suggests that the omission was an inadvertent oversight by the judge, to which neither party objected.

the Fourteenth Amendment to the United States Constitution." Commonwealth v. Redmond, 53 Mass. App. Ct. 1, 6-7 (2001). Where there is no objection to such an omission, however, we review for a substantial risk of a miscarriage of justice. Id. at 7.

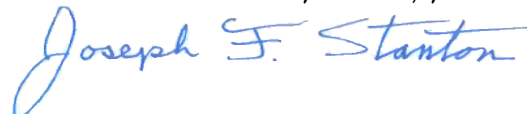
To prove the defendant guilty of possession, the Commonwealth was required to show that he knowingly or intentionally possessed the cocaine. See G. L. c. 94C, § 34. Although the defendant stipulated that the substance in question was cocaine, thereby removing that fact from the jury's determination, he did not stipulate to either knowledge or intentional possession. The clear and undisputed omission of these elements from the instructions constituted error.

Nevertheless, the Commonwealth contends that no substantial risk of a miscarriage of justice occurred where the defendant's strategy at trial was to admit guilt. We disagree. Defense counsel's statement in his closing argument was not a substitute for a proper guilty plea, and thus did not relieve the obligations of the judge and jury, once engaged in a jury trial, to instruct and convict on every element of the crime charged. See Commonwealth v. Rivera, 76 Mass. App. Ct. 304, 308 (2010). Nor may we presume that, absent an instruction, the jury

understood the legal definitions of knowledge and intent.³
Because the jury were simply unaware of the elements required to
convict the defendant, we necessarily conclude that the error
"materially influenced" the guilty verdict. Commonwealth v.
Alphas, 430 Mass. 8, 13 (1999). See Commonwealth v. Cowans, 52
Mass. App. Ct. 811, 819-820 (2001).^{4,5}

On the indictment charging
the defendant with
possession of a class B
substance, the judgment is
reversed, and the verdict
is set aside.

By the Court (Trainor,
Rubin & Blake, JJ.⁶),



Clerk

Entered: April 4, 2016.

³ See Criminal Model Jury Instructions for Use in the District
Court 7.820 (possession of a controlled substance), 3.120
(intent), and 3.140 (knowledge) (1999).

⁴ In view of our holding, we need not decide whether a colloquy
of the defendant was necessary in relation to the judge's
acceptance of his stipulation.

⁵ The defendant also claims that it was error to admit in
evidence a video recording of his booking at the police station.
The recording was offered to demonstrate the defendant's state
of mind relative to the armed assault with intent to rob
indictment. As the defendant did not appeal his conviction of
the lesser included offense, we need not address the issue.

⁶ The panelists are listed in order of seniority.